

Back in time to Roman Law

Thoughts on an analogy of 'Abuse of Right' in International Law

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The prohibition of abuse of right calls into question that branch of legal positivism that sees law as a 'pure' discipline with necessarily no connection with morality (the so-called exclusive positivism). Law prohibits something that is allowed within its own system, but that is rejected according to other rules (the rules of morality). Is the law therefore flawed? Is it cynical? One might object and say that if the prohibition exists in a legal system it is not extra-legal anymore. But this is a purely formalistic reading, which fails to reflect the reality that there are moral considerations that filter into a legal system. It is due to positivistic anxiety to avoid the negative influence of morality.

In this post we will take a look at the late Republican Roman legal system, trying to conceptualise their basis for prohibiting 'abuse of right' and reflect on whether that system can act as a source of inspiration for international law today through a 'Roman law analogy'.

Abuse of right is a glitch in the system. A logomachy. Even a logical paradox, according to the [reconstruction of Guski](#). As an eminent commentator has it: '[i]f I use my right, my act is licit; and when it is illicit it is because I exceed my right and act without right. The quote stems from Planiol's (1853-1931), *Treatise on the Civil law* of 1928 and illustrates that the overuse of rights may result in an unlawful act.

In a first sense, abuse of right occurs when power conferred by law is exercised for the sole purpose of creating damage to another. In another sense, abuse of right is when a power conferred by law is exercised intentionally for an end which is different from the purpose for which the right has been created for, with the result that damage to someone else is caused.

In both cases, the notion of 'abuse of right' implies that extra-legal considerations (among which, moral ones: 'the action is lawful, but is it right?') enter into the system of law. But this exclusively holds true in a modern understanding of the law. The distinction between 'law' and 'morality' would have been puzzling to a Roman lawyer: the ones that, for us, are *moral* considerations, were fully fledged *legal* tools, in the sense that they were fully integrated in the legal system. A famous definition of 'law' given by the Roman lawyer Celsus (2nd century a.C.) is 'the art of what is good and fair'. The notion of *Aequitas* (equity) is a perfect example ([Digestus](#) 1,1,1).

Roman Law

Aequitas was the legal tool used to counter abuses of right through the mechanisms we explain below. As mentioned, in the Roman legal system equity was not just about morality in the way we understand it: it became a technical legal tool.

How did *aequitas* 'filter' into the legal system? It was through the notion of good faith. The Digest's passage attributed to Tryphoninus makes this link explicit: 'The good faith that is required in contracts calls for maximum equity'. Good faith and equity were applied not only to regulate specific types of contract, to resolve single concrete disputes or avoid technical controversies, but also to produce other juridical instruments (such as *actiones*, actions at law).

One of such actions based on good faith was introduced in the civil law precisely to tackle abuse of right: the *actio doli* ('action against fraud'). Famously, the Digest says 'no one, who exercises his own right, is deemed to harm others': this encounter limits precisely with the *actio doli*. There is indeed an abuse at least every time one uses his own right fraudulently.

Successively, the action would be made available also to the defendants in a legal dispute (the *exceptio doli*). The inextricable link between the *exceptio doli*, equity (and thus good faith) is clearly expressed by Paulus ([*Digestus* 44.4.1.1.](#)): «The praetor established this defence to the end that a person's fraud should not benefit him through the medium of the civil law but contrary to natural equity (...)». Paulus asserted that this specific instrument could be adopted as a relief for the gaps of defences available in law, or against anyone who wanted to use maliciously the rights that the law itself provided to him.

Aequitas and good faith were thus, among other things, the mechanisms through which late republican and imperial Roman law let the system adjust to moral and political demands – those were the instruments allowing for 'flexibility and change': a task that the law has to carry out at every time. In fact, the concept that (modern) international law allows for flexibility and change is borrowed from Lauterpacht – which allows us to transition to the next section.

Contemporary International Law

Today, it is fair to state that the notion of 'abuse' of right (e.g. in international law) implies moral considerations, as it amounts to stating that the law was used *wrongly*.

While the prohibition of abuse of law is a relatively uncontested feature, the grounds for such prohibition are moot. We saw how concepts such as *aequitas* entered into the Roman legal system: but how can moral values enter into international law? And how is this warranted? Apparently, there is no 'constitutional' mechanism to ensure that, in general, morality is trickling into international law.

An answer may derive from general principles, those the International Court of Justice shall apply when deciding controversies (Article 38(1) (c) of the Statute of the International Court of Justice). This would be nothing more than a domestic law

analogy, indeed a Roman law analogy as an ‘indication of policy and principles’ (to quote from Judge McNair in the *Advisory Opinion on the International Status of South West Africa*): as Roman law had *aequitas*, so may international law have some general principle. Naturally, the difference with *aequitas* is apparent: general principles are not inherent in the system, they are derived from it. General principles are anything but easily identifiable. General principles have not been agreed upon, thus they are not the expression of democratic – and, one might say with Habermas, [ethical – dialogue](#).

Let us accept, for the sake of the argument, that the principles may nonetheless be used for the purposes of instilling morality into a legal system. Then the general principle of good faith is a serious candidate for the role. Nonetheless, general principles do not come without difficulties. The first one is to determine what is the content of this general principle. The second is the application of the very concept of good faith – whatever its content – to the behaviour states or collective entities (such as companies). The third is that not all abuses derive from lack of good faith.

Before addressing these challenges, we have to take a step back: who creates those general principles and therefore what the ‘moral rules’ are in the international community? If morality has to enter the system, whose morality is it? The ‘utopian’ answer is, of course, that the general principle – the morality – is universal.

It is far from clear what principle may perform the re-equilibrative function in international law that is to say, what is the gate through which morality enters. Even if, a gate is found, it is then far from obvious whose morality should permeate the system.

Perhaps inspiration may be drawn, from aspects of the Roman law experience. For Roman law, equity and good faith were never legally defined, precisely in order to provide them, and the system, with flexibility. This openness allowed the law to adapt to social and political changes throughout the centuries.

May *bona fides* – the principle Romans used to re-equilibrated and renew law – also take that same function in international law? The difficult definition of the concept of good faith should not be an obstacle – the undeniable difficult application, is not an argument against the theoretical validity of the concept. The straightforward application of desires and motivations – necessary to ascertain the good faith of an actor – to collective entities is, we believe, more difficult.

Are we resuscitating a moral conception of law? In other words, are we saying that, in addition to a legal system there should be a (superior) system based on rules derived from morality (or, as it used to be in the past, from Reason or from the word of God)? Perhaps: invoking morality to ‘correct’ the law shatters a positivistic paradigm. Or can Roman law that employs extrajudicial concepts and values, which guarantee flexibility to the legal system, show us a way out?

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